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No. 99-935

IN THE
SUPREME COURT OF THE UNITED STATES

MICHAEL CHANDLER, *et al.*,
Petitioners,

v.

FORREST H. "FOB" JAMES, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF *AMICUS CURIAE* OF THE INTERFAITH ALLIANCE AND THE HORACE MANN LEAGUE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

PROF. FRANK S. RAVITCH*
Oldfield Law Building
6441 East Colonial Drive
Orlando, FL 32807-3673
(407) 275-2000 ext. 245

*Counsel of Record

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INTEREST OF THE *AMICUS CURIAE*[1]

THE INTERFAITH ALLIANCE

The Interfaith Alliance is a national grassroots organization headed by clergy and concerned lay people of faith. The Interfaith Alliance and its 109 local alliances and aligned groups in 35 states uphold the positive role that religion can play in public life. We recognize that diversity and tolerance are essential components of our democratic tradition and that they must be promoted, preserved, and celebrated. Mainstream religious leaders from across the country organized the Interfaith Alliance in 1994 to speak out against the divisive use of religion in the public square.

THE HORACE MANN LEAGUE

The Horace Mann League of the United States of America was founded by a group of leading educators in 1922 to perpetuate the ideals of Horace Mann, founder of the American public school system. The League believes that the public school system of the United States is an indispensable agency for the perpetuation of the ideals of our democracy and a most necessary unifying and dynamic influence in American life. Our public schools should be free, class .less, non-sectarian, and open to all children. Accordingly, the League believes that the American tradition of separation of church

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1 The parties have consented to the filing of this brief. Copies of the letters of consent have been filed with the Clerk of the Court. This brief was not authored in whole or in part by counsel for a party, and no person or entity, other than *amicus curiae*, their members, and their counsel, made a monetary contribution to the preparation and submission of this brief.

and state must be preserved inviolate and should be most vigorously and zealously safeguarded.

ARGUMENT

The Eleventh Circuit's decision allowing organized, student initiated prayer at school controlled forums such as graduation ceremonies, sporting events, and assemblies, threatens both freedom of speech and religion. This is so because the Eleventh Circuit decision ignores this Court's carefully laid out public forum doctrine, and in the process fails to recognize the difference between government toleration of private speech and government sponsorship of it. This is a classic case of a government entity favoring the viewpoint of the majority, while excluding other viewpoints. Cloaking religious favoritism in the garb of free speech may disguise it, but it does not undo it.

The Eleventh Circuit's decision also undermines this Court's Establishment Clause precedents. It overlooks the very real coercive effects that exist when adherents of the majority faith commandeer school events and equipment to exercise their beliefs with the tacit approval of government officials. Moreover, it fails to recognize that endorsement can exist at school controlled events regardless of whether prayers are "commanded" or "permitted" by those with the power to do so.

I. THE ELEVENTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S FREE SPEECH CLAUSE DECISIONS

This case is about organized prayer at school events, and not about censorship of "private" prayer. It is axiomatic that students may pray privately and even proselytize their fellow students at school during free periods, or whenever they may speak freely about non-curriculum related subjects. *Board of Education of Westside Community Schools v. Mergens*, 496 U.S. 226, 250 (1990); U.S. DEPT. OF EDUCATION, PRESIDENTIAL GUIDELINES ON RELIGIOUS EXPRESSION IN PUBLIC SCHOOLS (Aug. 1995, *revised* May 1998); *See also Lee v. Weisman*, 505 U.S. 577, 629-630 (1992)(Souter, J., concurring)(graduating students "may express their religious feelings" before and after commencement, and at privately sponsored baccalaureate ceremonies). The injunction the Eleventh Circuit vacated explicitly acknowledged the same. (Pet. App. D.) The prayer involved in this case is not of this "private" type. Yet the Eleventh Circuit decision treats school-sponsored sectarian prayer delivered over the intercom as "private" so long as the supplicant is not a school board employee. No basis exists among this Court's precedents for this remarkable conclusion.

The Eleventh Circuit's decision suggests that even if a school district has created an arena in which majoritarian religious speech is clearly favored, it may justify such favoritism based on the free speech rights of the speaker. Thus the panel's decision distorts the Free Speech Clause. If allowed to stand, it will wreak havoc with the public forum doctrine established by this Court and will foster an environment hostile to the speech and religion rights of

those required by law to go to school who do not share the majority faith or viewpoint.

A. The Decision Sanctions Viewpoint Discrimination

By suggesting that students and others have a free speech right to engage in organized, public prayer at school-sponsored events, the Eleventh Circuit draws an artificial line between government speech and private speech. *Chandler v. James*, 180 F.3d 1254, 1257 n.6, 1264 (11th Cir. 1999). Having extracted the prayer in question from the realm of government action (even when government facilities are used to deliver it in a captive audience setting), the opinion suggests that preventing such prayer somehow reflects hostility toward religion and interferes with private speech rights. *Id.* at 1261. Thus, the reasoning goes, allowing such organized prayer at school events does not run afoul of the Establishment Clause, but in fact, prevents violations of the Free Speech Clause.

This reasoning is specious, and when carefully analyzed it leads to violations not only of the Establishment Clause, but of the Free Speech Clause. That is the ultimate irony of the decision.

A simple review of the record in this case when evaluated under this Court's free speech doctrines demonstrates the massive flaws in the Eleventh Circuit's analysis. Both in their substance and application, DeKalb County's policies and practices favored religious speech and favored the speech of the religious majority. DeKalb County permitted sectarian Christian prayers over loudspeakers at school events. It permitted Christian ministers to

deliver religious remarks at school assemblies. It permitted New Testament distributions by Gideons, and permitted numerous other sectarian, always Protestant, practices. (*See* Pet. Br. at 3-7.)

The record is devoid of any evidence that DeKalb County made its events or equipment available to persons wishing to express any other viewpoint. No Catholic, Jewish, Muslim, or other non-favored prayer was ever given, and the environment fostered by school officials was not conducive to the expression of minority religious views.

Sponsorship of, and favoritism toward, religious speech is the net effect of DeKalb County's permitting prayers and religious exercises to the exclusion of other speech. This results in discrimination against non-majoritarian religious speech and non-religious speech.[2] This type of government sanctioned viewpoint discrimination is prohibited by the Free Speech Clause. *Rosenberger v. Rectors and Visitors of the Univ. of Virginia*, 515 U.S. 819, 828-830 (1995); *Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. 622, 641-6143 (1994); *See also Capital Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 766 (1995)(acknowledging that when government favors religious speech in a public forum it endorses that speech and engages in content discrimination).

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2 As this Court has acknowledged, even in a traditional public forum one kind of speech can so dominate that content discrimination results. *Cf. Capital Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 766 (1995)("giving sectarian religious speech preferential access to a forum....would violate the Establishment Clause" and the Free Speech Clause because "it would involve content discrimination").

Conversely, if the decision is read as envisioning school-sponsored events as equal access events for free speech purposes (thus putting the best face on the decision), the Eleventh Circuit has created a regime of chaos rather than viewpoint discrimination.[3]

Imagine a graduation ceremony where a speaker is on stage surrounded by school officials and teachers, with parents and happy graduates in the audience. The speaker, who may be a student or nonschool "other," says a prayer to which several persons, including students, object for different reasons. Each wants the opportunity to respond and walks on-stage to offer an alternative prayer or statement. Or imagine a pre-game prayer at a sporting event that causes twenty students or others with differing viewpoints to want equal time to state their prayers or objections. None should have his prayer curtailed since the Eleventh Circuit declared a general free speech right for students and others to pray. This situation, which the decision might well create, would drastically change the understood nature of graduation ceremonies and kickoff times, not to mention other school activities.

Constraints of time and the risk of coercion or attribution of the speaker's message to the government sponsoring it exist because public schools are not public squares. The Eleventh Circuit, by sanctioning either viewpoint discrimination or chaos, ignored these realities or failed to recognize them. The result distorts both freedom of speech and religion.

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3 Such equal access never occurred in DeKalb County. Only tongue-in-cheek could one contend that DeKalb County school officials have or will create a generalized platform for non-favored speech.

B. Public Schools are not Public Squares

The Eleventh Circuit decision seems to assume that a public forum existed at the events in question, but does not directly address the issue, despite the fact that the existence of a public forum is a prerequisite to the free speech analysis upon which the court purported to rest its decision.[4] Absent a public forum, for example, nonschool others do not have the right of access to public schools for speech purposes conferred on them by the Eleventh Circuit. *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384, 390, 392-393 (1993); *Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 46, 48-49 (1983).

In the public square a citizen may freely express his or her views without government officials controlling the event, and without a captive audience. *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 266-267 (1988); *Perry*, 460 U.S. at 45; *Hague v. C.I.O.*, 307 U.S. 496, 515 (1939). Those who oppose the views may use the same forum for stating their opposition or they may

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4 Since the Eleventh Circuit never identifies the basis for the right to engage in such expressive activity at school controlled events, the court must have assumed either a public forum, a designated public forum, or some sort of "super-*Tinker*" right. As this sub-section demonstrates, the first two options are inconsistent with the record and this Court's public forum doctrine. The third possibility is in direct conflict with *Hazelwood*, 484 U.S. 260, 266-267, 270-273 (in school-controlled fora the school need not tolerate all student speech), and, *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986)(same).

simply walk away. In the public school context, quite the opposite is true because of the unique constraints of the school setting. If, for example, students opposed prayers given at an assembly, over the loudspeaker at a football game, or from the podium at a graduation ceremony, they could not simply walk up and commandeer the podium and respond.

A school controlled event is not a public forum unless the school so designates. When a school creates a designated public forum, the rules of a traditional public forum apply.[5] *Perry*, 460 U.S. at 45-46. Under these circumstances, opposing speakers must be given equal time and resources. The state may not favor religious speech, and must allow open communication and debate, absent a regulation narrowly drawn to achieve a compelling state interest. *Perry*, 460 U.S. at 45; *Widmar v. Vincent*, 454 U.S. 263 (1981); *Hague*, 307 U.S. at 515.

Herein lies the paradox. If DeKalb County suggests that its school events were some sort of a public forum, they undermine their own case. For if a public forum or a designated public forum existed at the events in question, DeKalb County engaged in a systematic pattern of viewpoint discrimination against minority views and discrimination against nonreligious speech generally. The record, of course, belies any pretense of a public forum up until the time the Eleventh Circuit seemingly created one (without reference to the record). What DeKalb County had was in fact a platform for prayer that other speech did not share. Of course, this violates the Establishment Clause, but it also violates the Free Speech Clause.

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5 The school can limit the types of speakers to those relevant to the forum, such as students. *Perry*, 460 U.S. at 48.

Thus, the Eleventh Circuit's decision cloaking religious favoritism as Free Speech is especially dangerous and troubling.

II. THE ELEVENTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S ESTABLISHMENT CLAUSE DECISIONS

A. The Panel's Decision Contradicts This Court's Decision in *Lee v. Weisman*, and Places the Burden of Avoiding Religious Compulsion on Nonconforming Students

The Eleventh Circuit's decision inverts the principles underlying this Court's Establishment Clause jurisprudence. In *Lee v. Weisman*, 505 U.S. 577 (1992), this Court held that graduation prayer at school-sponsored events violates the Establishment Clause because it coerces dissenting students to participate in a religious exercise. The Eleventh Circuit found organized prayer at school-controlled events that is led by persons other than school officials distinguishable from the unconstitutional prayer in *Lee* because in *Lee* a school official chose a member of the clergy to deliver the prayer and issued guidelines for it. *Chandler v. James*, 180 F.3d 1254,1257, 1263-64 n.13, n.16. (11th Cir. 1999).

The artificial distinction drawn by the Eleventh Circuit is spurious when judged against *Lee*. The prayer in *Lee* was not coercive merely because a principal influenced it; it was coercive because it occurred at a school-sponsored, controlled, and funded event that was essentially obligatory. *Lee*, 505 U.S. at 593-597; *ACLU v. Black Horse Pike Regional Bd. of Educ.*, 84 F.3d 1471, 1478-83 (3d Cir. 1996)(en banc). Had this Court meant in

Lee that religious exercises at a school-sponsored event were unconstitutional only to the extent that a school official gave guidelines, this Court would have had no need to ground its holding in large measure on the effect of the prayers on persons who were compelled to participate. *See Lee*, 505 U.S. at 592-597.

The remainder of the Eleventh Circuit's treatment of *Lee* is even less respectful. The Eleventh Circuit transformed *Lee*'s concern with the rights of captive dissenters to nothingness: "Those who do not espouse a speaker's religious beliefs are free not to listen, and to express their disagreement by not participating in any way." *Chandler*, 180 F.3d at 1263. The panel indicated its belief that *Lee* sanctioned "social isolation or even anger" as "the price of conscience or nonconformity." *Id.* (*quoting Lee*, 505 U.S. at 597).[6] This, the Eleventh Circuit has decreed, is the price of liberty in America. *Chandler*, 180 F.3d at 1263.

The Eleventh Circuit also overlooked the dynamics of the school setting and the coercive pressures operating there. *See Lee*, 505 U.S. at 592-594. This Court has never required silent participation or standing in the hallway in order to escape religious compulsion in the public schools. *Lee*, 505 U.S. at 594-596; *School District of Abington Township v. Schempp*, 374 U.S. 203, 287-90 (1963)(Brennan, J., concurring).

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6 How thoroughly this language is ripped from its context is apparent from reading the very next sentence in *Lee*, not to mention the entire opinion. *Lee* does not sanction callousness toward dissenting schoolchildren.

B. The Activities at Issue Pose a Special Threat to Religious Minorities and Dissenters, and are Exceptionally Coercive

The Eleventh Circuit's decision ignores history, social context, and common sense by finding that it is not coercive or an endorsement of religion to favor the prayer of the religious majority, even when that prayer occurs at school sponsored and controlled events. Unfortunately, there is a long and tortured history in this nation of religious exercises in the public schools facilitating violence against religious minorities and dissenters, either because they did not participate or because they objected to those exercises. *See generally* FRANK S. RAVITCH, SCHOOL PRAYER AND DISCRIMINATION: THE CIVIL RIGHTS OF RELIGIOUS MINORITIES AND DISSENTERS (Northeastern Univ. Press 1999). From the anti-Catholic violence of the 1840's to cases in the last few years,[7]

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7 In the Nineteenth Century violence against Catholics was facilitated by school prayer and bible reading. Ravitch, SCHOOL PRAYER AND DISCRIMINATION at 4-7; Lloyd P. Jorgenson, THE STATE AND THE NON-PUBLIC SCHOOL, 1825-1925 (Univ. of Missouri Press 1987) at 76-83; James Hennesey, AMERICAN CATHOLICS: A HISTORY OF THE ROMAN CATHOLIC COMMUNITY IN THE UNITED STATES (Oxford Univ. Press 1981) at 122-125; Leo Pfeffer, GOD, CAESAR, AND THE CONSTITUTION (Beacon Press 1975). Sadly, while the level of bloodshed may be lower today, recent cases demonstrate the violent conflict that can be facilitated by school prayer. *See* Ravitch, SCHOOL PRAYER AND DISCRIMINATION at 7-18.

school prayer has called attention to difference, and it has frequently been peers at school who have exploited that difference in a persecutorial fashion. *Id.* (documenting a number of cases, both reported and unreported, of discrimination against religious minorities and dissenters facilitated by school prayer); *Bell v. Little Axe Independent School Dist. No. 70*, 766 F.2d 1391, 1397 (10th Cir. 1985)(documenting vitriolic incidents of harassment and discrimination aimed at two families that objected to majoritarian religious activity in a public school). The discrimination and violence has been especially pronounced when school officials have fostered an environment such as that in DeKalb County.[8]

A vast array of data indicates that religious harassment and discrimination against members of religious minorities are reinforced when student adherents of the majority religion perceive that their religious views are favored by school officials. Thus, when school officials permit school-controlled settings to be used for religious exercises the effects may extend beyond endorsement and coercion to discrimination.

Moreover, the pressure, ostracism, and marginalization that caused this Court to strike the rabbi's prayer in *Lee* may be magnified when the prayer is given by a peer with the support of a majority of one's peers,[9] at an event controlled by the government.

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8 *See* discussion of the *Herring*, *Herdahl*, *Bell*, and *Bauchman* cases in Ravitch, SCHOOL PRAYER AND DISCRIMINATION at 8-16.

9 This does not minimize the fact that the Eleventh Circuit's opinion allows prayer by either clergy or a student. Under that decision, clergy may demand the podium upon a claim of generalized First Amendment rights to the same extent that a student may. *Chandler*,

See generally Ravitch, SCHOOL PRAYER AND DISCRIMINATION. Numerous studies from a variety of disciplines demonstrate that the peer pressure and coercion discussed in *Lee* is far more pronounced when a student's peers are engaging in religious activity with the direct or tacit permission of school authorities.[10] Although often dependent upon the religious demographics in a given location, the dynamics, and the attendant discrimination and harassment, are relatively predictable.

All of this data makes one point painfully obvious- school prayer generally, and especially when supported by a majoritarian sentiment with tacit government approval, is especially coercive, alienating, and potentially violence- producing. Therefore, both from an endorsement and coercion perspective, organized public prayer at school-controlled events, even if student-initiated, produces the divisiveness from the government's pulpit the Establishment Clause was designed to prevent. *Lee*, 505 U.S. at 591-592; *Id.* at 606-607 & n.10 (Blackmun, J. concurring); *Id.* at 630 (Souter, J., concurring); *Grand Rapids v. Ball*, 473 U.S. 373, 382-383 (1985); *Engel v. Vitale*, 370 U.S. 421 (1962).

The Eleventh Circuit failed to recognize what this Court

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180 F.3d at 1257 n.6.

10 For a discussion of, and citation to, numerous studies from the social sciences demonstrating the impact of peer pressure and authority figure behavior on students, as well as the connection between religious orientation and discrimination, *See* Ravitch, SCHOOL PRAYER AND DISCRIMINATION at Chapter Four.

recognized in *Lee* and what James Madison recognized in his famous Federalist No. 51:

> In a free government the security for civil rights must be the same as that for religious rights. It consists in the one case in the multiplicity of interests, and in the other in the multiplicity of sects. The degree of security in both cases will depend on the number of interests and sects.....In a society under the forms of which the stronger faction can readily unite and oppress the weaker, anarchy may as truly be said to reign as in the state of nature, where the weaker individual is not secured against the violence of the stronger....

James Madison, "Federalist No. 51," *in* THE FEDERALIST PAPERS (Clinton Rossiter ed., Penguin Books 1961).

Madison understood that a central aspect of religious freedom is that government may not choose among the multiplicity of sects that which it will favor. An environment such as that fostered by DeKalb County, where a majority can dictate the religious exercises the minority must explicitly or implicitly participate in at school-controlled events, where school policies foster majoritarian religious rule at school-controlled events, where such practices were formally endorsed by a state statute, and where religious harassment may be aimed at those who oppose the prevailing views, subverts Madison's vision. He understood both the danger to individual freedom posed by factional domination and that in the religious context factional domination is especially

dangerous. James Madison, "Federalist No. 10," *in* THE FEDERALIST PAPERS (Clinton Rossiter ed., Penguin Books 1961). The hostility toward those who do not share the dominant faith in the present case demonstrates the salience of Madison's vision.

To the extent that the Religion Clauses embody Madison's vision of equal protection for minority religious sects, DeKalb County's policies are more dangerous to religious freedom than the prayer struck in *Lee*, because they empower a majoritarian religious faction to routinely use the machinery of the state to force a captive audience to participate explicitly or implicitly in sectarian religious activity in school-controlled settings. This is the type of situation Madison feared, this Court has proscribed, and the Eleventh Circuit now allows.

C. The Eleventh Circuit's Focus On Whether Officials "Permitted" Or "Commanded" The Religious Exercises Is Misplaced

The Eleventh Circuit tries to avoid the logical result of *Lee* and this Court's other Establishment Clause precedents by creating a dichotomy between "permitting" prayer and "commanding" it in the closed environment of the school setting. *Chandler*, 180 F.3d at 1264. Thus, the panel held that it is acceptable for a school to "permit" students and others to give organized, public prayers in classrooms, at assemblies, and over loudspeakers at football games and graduations. According to the Eleventh Circuit, even ministers may speak at school-controlled events so long as the school does not "command" prayer. *Id.* at

1257 n.6, 1264. This dichotomy is especially troubling because it not only flies in the face of this Court's First Amendment holdings, but is exceptionally formalistic and ignores the overwhelming and uncontested facts of the case.[11]

The word "permit" does not imply the passivity that the Eleventh Circuit suggests it does, especially when the literal definition is considered in context. The Oxford Desk Dictionary defines "permit" as follows: "1. Give permission or consent to; authorize; allow. 2. Give an opportunity (to)....." THE OXFORD DESK DICTIONARY (American Ed., Oxford U. Press 1995). Thus, "permitting" organized prayer at school controlled events is "authorizing" that prayer, consenting to it, and giving permission for it to occur in settings where government officials exercise plenary control. Both doctrine and common sense tell us that a public school cannot authorize prayer at school-controlled events, using school equipment, without both endorsing that prayer and coercing non-believers. *Lee*, 505 U.S. at 593-597; *Engel*, 370 U.S. at 430-431, 435; *Black Horse Pike*, 84 F.3d at 1478-88; *Gearon v. Loudoun County Sch. Bd.*, 844 F.Supp. 1097 (E.D.Va. 1993).

For this reason, the "permit/command" dichotomy does not save DeKalb County's policies and practices under any of the tests used by this Court in Establishment Clause cases. The permit/command distinction cannot solve the coercion problem. It does not matter whether a speaker is picked by the principal,

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11 The record demonstrates that school officials carved out time at graduations for invocations and benedictions. (Pet. App. E40-47). Further, the statute at issue used the word "permit," so it is natural that in enjoining applications, the injunction should speak in terms of what is not permitted.

students, or self-selects by laying claim to generalized First Amendment rights. When prayer occurs in a captive audience setting controlled and sponsored by the school coercion exists.

Similarly, the permit/command dichotomy is at odds with this Court's precedents on government endorsement of religion. *County of Allegheny v. ACLU*, 492 U.S. 573, 592-594 (1989); *Wallace v. Jaffree*, 472 U.S. 38, 59-61 (1985); *Lynch v. Donnelly*, 465 U.S. 668, 690-691 (1984 (O'Connor, J., concurring). A significant focus of the endorsement test is whether government appears to take "a position on questions of religious belief," makes adherence "to a religion relevant in any way to a person's standing in the political community," *Allegheny*, 492 U.S. at 594; *Lynch*, 465 U.S. at 687 (O'Connor, J., concurring), or sends the message that a particular religion, or religion in general is "favored," "preferred," or "promoted" over irreligion or other religious beliefs. *Allegheny*, 492 U.S. at 593-594; *Edwards v. Aguillard*, 482 U.S. 578, 593 (1987). If DeKalb County "permitted" activities from the schools' pulpit that promoted religion generally, promoted majoritarian religious beliefs, or fostered an environment hostile to nonadherents, its practices fail the endorsement test. "Permitting" students or others to engage in religious exercises in school-controlled captive audience settings is the essence of endorsement.

The Eleventh Circuit expressed its belief that dissenters should express their tolerance for majoritarian prayer by silently enduring it. *Chandler*, 180 F.3d at 1263. When this Court's teachings that government may not make adherence to a religion relevant to a person's standing in the political community are ignored, however, tolerance does not follow. Discrimination does.

Finally, the artificial dichotomy between permit and command allows a school to engage in viewpoint discrimination and favoritism, a result completely at odds with this Court's holdings. *Rosenberger*, 515 U.S. at 828-830; *Turner Broadcasting, Inc. v. F.C.C.*, 512 U.S. at 641-643; *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984); *See also Capital Square Review Bd.*, 515 U.S. at 766 (acknowledging that when government favors religious speech it engages in content discrimination). The result of the Eleventh Circuit's decision will be especially painful for dissenters whose speech is effectively silenced by Dekalb County's policies and the atmosphere they foster, and who are further marginalized by the government's endorsement of majoritarian religious views.

D. The Eleventh Circuit's Treatment of "Proselytizing" Prayer is Erroneous

Closely related to the permit/command dichotomy is the Eleventh Circuit's limitation of "coercion" to proselytizing speech. Not only is this inconsistent with this Court's endorsement precedents, but it is also fundamentally at odds with *Lee*, which focused on subtle coercive pressures that inhere in the environment, not in the content of the speech. *Lee*, 505 U.S. at 592-597.

The Eleventh Circuit panel writes:

> [A] student's right to express his personal religious beliefs does not extend to using the machinery of the state as a vehicle for converting his audience.

> The Constitution requires that schools permit religious expression, not religious proselytizing..... Proselytizing speech is inherently coercive and, the Constitution prohibits it from the government's pulpit. (Citations omitted).

Chandler, 180 F.3d at 1265.

This statement illustrates the lack of depth in the panel's analysis. Since the Eleventh Circuit justified its decision to permit prayer at school-sponsored events based on the free speech rights of students and nonschool others, and on the absence of state action, it is especially odd that the panel would turn around and suggest that the same government which supposedly lacks control over any speakers except its own employees could censor the speech of "non-state actors" for proselytizing material. How may a student be a state actor for purposes of proselytizing speech but not sectarian speech, when the sectarian speech is also issued from the government's pulpit?

Moreover, divorcing the words of a prayer from its social context is either disingenuous or counterproductive. When a religious faction uses the machinery of the state to regularly reinforce its beliefs in captive audience settings, the effect is proselytizing, regardless of the words used. To pretend otherwise is to ignore the impact that constant reinforcement of a religious message (especially a majoritarian one) via the machinery of the state has on impressionable students subject to peer pressure. One need not utter the word "convert" to suggest that conversion to the dominant faith is the best path. It is no secret to most non-Christians that there is a proselytizing message inherent in a sectarian Christian

prayer aimed at a captive audience.

Ironically, the Eleventh Circuit's holding in this regard serves to underscore that the schools have significant control over the supposedly "private" free speech at issue in this case. That government control reinforces the absence of a public forum, the endorsement of the religious views expressed, and the government's influence over the environment in which those views are expressed.

CONCLUSION

For the reasons stated above, *amicus curiae* respectfully request that this Court grant the petition for writ of certiorari in this case.

Respectfully submitted,

PROF. FRANK S. RAVITCH
Oldfield Law Building
6441 East Colonial Drive
Orlando, FL 32897-3673
(407) 275-2000 ext. 245